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No. 872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORTH CENTRAL AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
LAKE CENTRAL AIRLINES, INC., *Intervenor,*
LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP, *Intervenor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR LAKE CENTRAL AIRLINES, INC., IN OPPOSITION

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

Counsel for
Lake Central Airlines, Inc.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

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OPINIONS BELOW

The opinions and orders of the Civil Aeronautics Board are unreported. They consist of the Board's original opinion and order of July 9, 1957 (No. E-

11548), denying petitioner's application to acquire Lake Central Airlines (R. 480-519), and its order of November 1, 1957 (No. E-11932), denying petitioner's request for reconsideration (R. 558-560).

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported and is set forth in Appendix B of the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of Lake Central Airlines, the effort of the petition to raise constitutional and statutory questions has no basis in the action of the Civil Aeronautics Board, North Central's petition to the Court of Appeals to review that action, or in the decision and opinion of that Court. The only issues that have ever been properly involved in this litigation are those posed by North Central's petition for review in the Court of Appeals, the pertinent portion of which is attached hereto as Appendix A, and by its stipulation of the issues before that Court (R. 1-2), only one of which is presented in the petition for certiorari. The only questions therefore presented by the petition are:

1. Was the Board's disapproval of the proposed acquisition inconsistent with its action in other merger cases?

2. Is further judicial inquiry permissible or required into questions, which were raised *sua sponte* by the Court of Appeals, which were not raised by petitioner

either before the Board or the court and which, after exploration, the Court of Appeals dismissed.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Civil Aeronautics Act involved are set forth in the appendix to respondent's brief in opposition. In the opinion of Lake Central no other statutory or regulatory provisions are involved.

STATEMENT

This litigation involves a routine proceeding before the Civil Aeronautics Board on an application by North Central Airlines to acquire control of Lake Central Airlines and merge the operations of the two carriers. It was denied by the Board after full hearing without any challenge by North Central to the regularity of the proceedings. The subsequent petition of North Central to the Court of Appeals to review the Board's action was likewise of a routine character raising only the familiar and oft litigated issues of the adequacy of findings and evidence (R. 1-2).

The North Central application to acquire control of Lake Central raised only a single statutory issue before the Board under Section 408(b) of the Civil Aeronautics Act, i.e., was such an acquisition and merger of the operations of the two air carriers consistent with the public interest.[1] The term "public interest" is in turn defined by Section 2 of the Civil Aeronautics Act and the standards there provided have been given

[1] There was also before the Board an application to establish interlocking relationships between the two carriers which was subject to Section 409 of the Civil Aeronautics Act. This application was incidental to the acquisition and the same standard of the "public interest" was applicable to it.

concrete meaning through almost two decades of administrative practice. Thus, practically all of the matters referred to in petitioner's "Statement of the Case" were irrelevant to the Board's decision and played no part therein.

A hearing on the application in accordance with these standards was held before an Examiner of the Board.

The Board's Bureau of Air Operations actively participated in the proceeding and wrote a brief to the Examiner (R. 429-441) recommending against approval of the acquisition and merger on the grounds that (1) the reason which existed in 1952 for a merger of Lake Central, i.e., the Wesner control, no longer existed; (2) disapproval of the proposal would permit an immediate development of local air service in the Ohio-Indiana area while approval would delay proper development of such service for several years; (3) the acquisition would not accord with the Board's essential reason for establishing local service carriers; (4) Lake Central was showing a steady improvement; (5) the hostility which exists between the two carriers would affect the success of any merger.

The Bureau also expressed the belief "that Lake Central's present management is well qualified". (R. 432)

On June 26, 1956, the Examiner issued his initial decision recommending approval of the proposed acquisition and merger (R. 441-467). The basic finding on which this recommendation rested was the Examiner's belief that Lake Central's system is too small and subject to too much trunkline competition to attain relative self-sufficiency in the foreseeable future so

that a merger was the only alternative to continued subsidy (R. 441-467).

When this recommendation came before the Board, it was opposed by the Bureau of Air Operations (R. 467-470). The Bureau advised the Board of its belief that the management of Lake Central was "skillful and competent" and that the carrier had an opportunity to build a sound independent local air service in the region it served which would be destroyed by approval of the merger (R. 470-478).

When the Board reviewed the matter it unanimously agreed with its Bureau of Air Operations rather than the Examiner. The Board set forth its reasons for disapproving the proposed acquisition and merger clearly and succinctly (R. 482-492). These were:

> (1) North Central and Lake Central were certificated to meet the requirements of separate trade areas for short-haul and feeder type service (R. 484). North Central basically serves the area north and west of Chicago while Lake Central serves the Ohio-Indiana area to the southeast of Chicago. This is in accord with Board policy to authorize operations by local companies whose interests are centered in the area to be served (R. 484-486). The record shows that the two areas served by Lake Central and North Central are not sufficiently related in terms of local traffic requirements to permit a sound integrated local service system. Thus the proposed acquisition would defeat Board policy in the establishment of local service operations (R. 486).
>
> (2) The proposed acquisition would create a large sprawling system of 5,000 miles extending from North Dakota to New York State serving 80 cities. This (a) would disperse management

over too much territory to permit the concentration on local traffic problems that is the essence of Board local service policy; (b) would result in the combined carrier concentrating on lucrative traffic between big cities to the neglect of service to the smaller communities that local service carriers are primarily designed to serve; and (c) would cause North Central to take on the characteristics of a trunk carrier and pose the kind of threat to the trunk lines that Board policy has tried to avoid (R. 486-488).

(3) The proposed acquisition and merger would produce a substantial period of uncertainty and confusion in the affairs of the two companies and jeopardize for an indeterminate period the continued rendition of reliable local service in an important and densely populated local service area. This uncertainty would be prolonged by the hostility existing between the parties (R. 488).

(4) Lake Central and North Central have opportunities for the realignment and expansion of their routes within their respective areas. The Board does not agree with the Examiner's conclusion that Lake Central does not have a reasonable chance of achieving self-sufficiency in the foreseeable future. Since the issuance of the Examiner's initial decision Lake Central's operating results have improved, the carrier has been awarded new route which will strengthen it, and there are pending other routes applications of Lake Central offering further opportunities for expansion (R. 488-491).

(5) While the proposed acquisition and merger could result in sizeable savings in subsidy, this is only one factor to be considered in determining the probable effect of the proposal on the public interest. On balance the Board concludes that it is not sufficient to outweigh the adverse effects upon the public interest, which the Board has found

would result from a merger of the two carriers (R. 490-491).

Thereafter North Central filed a lengthy petition with the Board for reconsideration of the order denying its application (R. 519-544). This petition, with one exception,[2] raised none of the issues upon which the present petition for certiorari is based.

Again when North Central filed its petition in the Court of Appeals for judicial review of the Board's orders the carrier raised only questions with respect to the adequacy of the Board's findings and the evidence to support the findings. (App. A hereto; R. 1-2)

After oral argument in the case, the Court of Appeals by letter dated October 13, 1958, requested the parties to file supplemental briefs on the certain procedural questions which had not theretofore been raised by any party to the proceeding, either before the Board or the court (R. 568).

The Court's subsequent opinion affirming the Board's orders dealt almost entirely with the issues of the adequacy of the findings and evidence which had been raised by North Central. The Court's conclusions on these issues were: (Pet. 39).

> "The reasoning of the Board seems amply clear. We think the conclusion flows rationally from the ultimate findings, and these in turn rest upon ample basic findings. The latter seem to be supported by ample evidence. Of course there are disputes as to the inferences to be drawn from raw factual data, but it is not our function to draw inferences.

[2] Point D in the petition (Pet. 18).

> "Our function is to ascertain whether the inferences drawn by the administrative agency are within the reasonable boundaries prescribed by the facts. We think they are in this case."

The Court likewise could find nothing inconsistent in the Board's action as compared to its action in other acquisition and merger cases (Pet. 39-40).

The Court's disposition of the supplemental issues raised by its letter of October 13, 1958, indicated that its consideration of the briefs with respect to these questions had convinced it that there was no substance to the issues. The opinion disposed of these issues, upon which the petition for certiorari primarily rests, with the following single sentence: (Pet. 39)

> "With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects."

Lake Central Airlines intervened in both the Board and court proceedings to protect the carrier's interest (R. 62-64). In the Board proceeding the carrier confined its participation to the submission of materials requested by the Board (Tr. 3061-3148).[3] The company supported the Board's orders before the Court of Appeals because it believed that those orders met applicable legal requirements and because a remand would prolong the cloud of uncertainty under which the carrier has been forced to operate during the pendency of the acquisition proceeding, which makes it difficult for Lake Central to secure needed capital (R. 431, 490).

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[3] Reference is to pages of the original record of proceedings before the Board which has been transmitted to this Court.

ARGUMENT

I

There Is No Conflict of Decision Involved

The decision of the Court of Appeals does not involve any conflict upon any legal point with any decision of another circuit requiring resolution by this Court, nor is any such conflict asserted in the petition.

II

There Is No Important Question of Federal Law Involved

The decision of the Court of Appeals does not involve any important question of Federal law which requires review by the Court.

The petition for review filed by North Central in the Court of Appeals (Appendix A hereto) and its stipulation to the court of the issues raised by that petition (R. 1-2) involved only routine questions of the adequacy of the Board's findings and the evidence to support those findings. The court's disposition of these issues, involving nothing more than an exercise of judicial discretion (Pet. 39), obviously does not give rise to a case requiring review by this Court.

Petitioner has strained to blow one of these issues into an important question of Federal law by claiming that the Court of Appeals sanctioned an unexplained departure by the Board from prior norms used in acquisition and merger cases (Pet. 18-24). However, an examination of the Court of Appeals decision shows that it could find no inconsistency in the Board's action (Pet. 39-40) and expressed the view that North Central did "not accurately assay" the prior Board cases upon which the carrier's argument rested (Pet.

39). Thus, petitioner's issue simply resolves itself into a difference of opinion between itself and the court below on the consistency of the Board's decisions in merger cases. This presents no question necessitating review by this Court.

Petitioner's principal claim that the decision of the Court of Appeals raises important questions of law rests on its contentions (1) that the Board unlawfully turned the acquisition proceeding into a competitive case between prospective purchasers (Pet. 10-13), (2) that the Board unlawfully held *ex parte* conferences with interested parties (Pet. 13-15), and (3) that the Board deprived it of a fair hearing by permitting Lake Central's employees to purchase the Weesner stock subject to the rights of North Central (Pet. 16-17).

Although petitioner now purports to find basic problems of law involved, the fact is that North Central did not raise any of these issues either with the Board or with the Court of Appeals (R. 1, 2, 519-544; Appendix A hereto). It is true that the Court of Appeals *sua sponte* explored the record to determine if any such problems were present and asked the aid of the parties by way of supplemental briefs. However, after this exploration the Court of Appeals found no issues of this nature to be involved and dismissed them in one short sentence (Pet. 39).

III

The Decision of the Court of Appeals Is Clearly Correct

Except for the one sentence disposing of the issues which it had explored *sua sponte*, the Court of Appeals decision related entirely to the issues raised by North

Central's petition for review concerning the adequacy of the Board's findings and the evidence to support those findings. North Central questions the decision on these points only with respect to its claim that the findings on which the Board's action rested departed from previously established norms. The Court of Appeals opinion of this claim (Pet. 39-40) requires no supporting argument. The Court was clearly correct in finding that the claim was factually erroneous and in emphasizing that decisions in these types of cases do not involve mathematical computations but informed agency judgments, which if reasonable, should not be reversed by judicial action.

The Court of Appeals was equally correct in its conclusions concerning the issues it had explored *sua sponte*. North Central's arguments with respect to these issues are based on erroneous statements of fact and significant omissions.

North Central's petition (pages 10-13) assumes that the Board did in fact convert the hearing on its acquisition application into a competitive proceeding between prospective purchasers. The fact is that the Board, acting in response to a motion by North Central, by Order No. E-9404, dated July 18 1955, severed out the North Central applications for approval of the proposed acquisition and for establishment of interlocking relationships and held hearings directed solely to those applications and the issues raised therein (Tr. 475, 481, 484). This fact is clearly shown by the notice of hearing in the proceeding, dated October 12, 1955, which set forth the issues to be heard as follows: (Tr. 579)

> "(1) Whether the acquisition of control of Lake Central Airlines, Inc., by North Central Airlines, Inc., would result in creating a monopoly or monop-

olies and thereby restrain competition or jeopardize a third air carrier and would not be consistent with the public interest pursuant to section 408 of the Act?

"(2) Whether the interlocking relationships of Howard A. Morey, Frank N. Buttomer, Grove Webster, Arthur E. Schwandt, Arthur E. A. Mudler, Joe Decoursin, Francis M. Higgins, Don Olen, Harold Emch, Harold N. Carr, A. L. Wheeler, and Robert B. Stewart, North Central Airlines, Inc., and Lake Central Airlines, Inc., will not adversely affect the public interest within the meaning of section 409(a) of the Act?"

At the beginning of the hearing the Examiner stated that these were the issues (Tr. 544) and they were the only issues to which the Board's opinion is directed (R. 480-519).[4]

North Central's effort to create an *ex parte* conference issue is equally ill founded. This effort is based upon conferences between individual Board members and officers of Lake Central in 1954[5] concerning the stock purchase program of Lake Central employees. At that time Lake Central's operations were under continuing Board supervision embodied in the Board order of December 30, 1952, in the *Indiana-Ohio Local*

[4] North Central's statement (Pet. 8) that the Board in 1955 severed out all applications by prospective purchasers other than that of Lake Central Employee Stockholders and proceeded to hearing involves implications that are untrue. There was not and never has been any application by the Lake Central employee group to be considered as a prospective competitive purchaser and the notice of hearing and the Board's opinion both show that no consideration was given to such a proposition.

[5] Three of the five members of the Board in 1954 were not on the Board in 1957 and did not participate in the unanimous agency decision to disapprove the proposed acquisition.

Service Case, 16 CAB 886, 939, extending the carrier's temporary certificate. This supervision required notification to the Board of various actions and prior Board approval of any changes in the voting trust arrangements under which the extension was granted. The carrier did not want these orders violated by employee stock purchases particularly since its temporary certificate was to expire in a few months on December 31, 1954. The conferences were not clandestine affairs, but were voluntarily made a matter of record in the acquisition case by the Lake Central officer involved (Tr. 1503). The obvious lack of bearing on the acquisition case of such conferences on an unrelated problem is borne out by the fact that North Central's counsel, who authored the present petition, did not even bother to cross examine about the matter although he had full opportunity,[6] and did not at any time mention the matter to the Board in the many briefs and petitions filed in the case (Tr. 1503 et seq., 3914, 4308), nor did he raise any issue with respect thereto before the Court of Appeals (Appendix A hereto; R. 1-2). On these facts the Court of Appeals, after fully exploring the matter, correctly concluded that there was no problem (Pet. 39).

Finally, North Central argues that the amendment of Lake Central's voting trust certificates to permit the employee group to purchase the carrier's stock subject to any rights of North Central deprived it of a fair hearing in the acquisition case because that case was thereby changed into a consideration of the relative merits of North Central control and operation of Lake

[6] If the conferences did in fact disqualify the two remaining Board members from participating in the acquisition case, cross examination would have revealed that fact.

Central as against control and operation by the Lake Central Employee Group. It is contended that this gave North Central the added burden of displacing an established management which is far superior to that of the Weesners. The petition concludes that this action was a violation of the *Ashbacker* doctrine (Pet. 16, 17).

The Board was clearly correct in its view that the question of who held the voting trust certificates during the pendency of the acquisition proceeding was wholly immaterial to the issues in that case. Moreover, there is not one shred of evidence in the Board's findings to support the claim of prejudice. The disapproval of the proposed acquisition and merger was based, not on the superior nature of the Lake Central management, but upon the bad effects of the proposed merger upon local air service in the midwest. In fact the Board stated (R. 482) that in view of its conclusions as to the undesirable effects of the merger "we see no need to discuss the relative merits of the North Central and Lake Central managements." Here again the Court of Appeals correctly dismissed the question.

The failure of North Central to raise the issues before the Board or the Court of Appeals upon which its petition primarily rests, without reasonable grounds for its failure, emphasizes the absence of any of the prejudice to that carrier which is now asserted and brings into play the provisions of Section 1006(e) of the Civil Aeronautics Act and Rule 38(k) of the Court of Appeals rules making unavailable to a litigant objections to agency orders not raised with the agency and in the petition for judicial review of such orders. *Unemployment Compensation Commission*

v. *Aragon*, 329 U.S. 143, 154, 155 (1946); *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (D.C. Cir., 1950); *Western Airlines* v. *Civil Aeronautics Board*, 196 F. 2d 933, 936 (9th Cir., 1952), *cert. den.* 344 U.S. 875; *International Brotherhood of Boilermakers, etc.* v. *National Labor Relations Board*, 259 F. 2d 957 (D. C. Cir., 1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

Counsel for
Lake Central Airlines, Inc.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
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